

No. 82-1571

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

FIRST ALABAMA BANK OF MONTGOMERY, N. A.,

Petitioner,

vs.

**CHARLOTTE KYLE MARTIN, KATHLEEN GERSON,
GLORIA McKEON, and VIRGINIA G. WELDON,**

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of Alabama

**OBJECTION TO MOTION OF
THE AMERICAN BANKERS ASSOCIATION
FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE AND REASONS
FOR WITHHOLDING CONSENT**

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As required by Supreme Court Rule 36, the Respondents file the following Objection to Motion of American Bankers Association for Leave to File Brief as Amicus Curiae.

Respondents refused to consent to the request of the American Bankers Association to file a Brief Amicus Curiae. The grounds of that Objection and the reasons for withholding consent were as follows:

1. The American Bankers Association should have no legal standing to help Petitioner-Bank escape liability for breach of fiduciary duty.

2. No member of the American Bankers Association will be affected by the decision of the Alabama Court, except members who may breach their fiduciary duty as did the Petitioner-Bank.

3. The question sought to be raised by the American Bankers Association was not properly raised in the Court Below or by the Question Presented in original Petition For Certiorari.

4. The question raised by Amicus Curiae was not raised by Motion to Amend or Clarify Decree of the Circuit Court; was not raised by original Brief or Application For Rehearing in the Supreme Court of Alabama; and was not raised by the original Petition For Certiorari.

5. The statement in Brief Amicus Curiae that the recovery approved by the Alabama Supreme Court was a “fluid class recovery” is contrary to the Record and to the Decree set out in Appendix E to the Petition.¹

6. The Judgment of the Alabama Court requiring Bank to put each Class Plaintiff in the status he would have occupied except for the Bank’s breach of trust, is not a “fluid class recovery”.

7. Under the express terms of the Judgment in question, the Petitioner-Bank was required to determine the amount of loss of principal and income sustained by each affected trust and class member as a result of Bank’s imprudent investments, and to make proper distribution of such lost principal and income.

8. The Judgment under attack specifically defines the two classes as the holders of units in the two Common Funds during the period of the loss occasioned by the Bank’s breach of trust. There is no award of a “fluid recovery” to persons not so suffering losses or to future beneficiaries not damaged.

¹ A-43, et seq.

9. The doctrine of “fluid class recovery” arises only where there is no proof of actual damages sustained; or where unclaimed damages must be distributed. The Judgment under attack specifically required the Bank to determine from its records the amount of loss sustained by each class member and to make proper distribution to such damaged class members. Thus, the concept of “fluid class recovery” does not apply at all in this case.

10. If there be any deficiency in the direction to distribute the loss to the proper parties, the remedy is not to set aside the Judgment declaring liability, but by way of supplemental order under the specific terms of the Alabama Statute.²

For these reasons, we respectfully request that the Motion for Leave to File Brief Amicus Curiae be denied and such Brief be stricken.

Respectfully submitted,

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² Alabama Code of 1975, § 6-6-230: “Further relief based on a declaratory judgment may be granted whenever necessary or proper.”